OF MATRIMONIAL ACTIONS AS EQUITY SUITS AND OF THE PLEADINGS THEREIN.[1]

For more than a hundred years during the Colonial period New York courts had no power to grant divorces, and, it is said, there were none.[2] In 1787, the first statute on the subject recited in its preamble the desirability of according such relief in litigation rather than by *ex parte* legislation; and created an action in Chancery for absolute divorce on account of adultery. Enlarged in its scope so as to cover causes for separation and annulment, that law was embodied in the Revised Statutes and eventually in the Code of Civil Procedure, that deplorable hodgepodge of substantive and grammatical law. Since then the divorce mill has ground with ever-increasing rapidity; and although at no railway station in this State have trains stopped "five minutes for divorce," —as legend says they have done elsewhere,—still the bonds of holy matrimony are reported to have been severed in fifteen minutes or less, which is all that can be reasonably asked. Yet to-day, as three recent decisions[3] disclose, Justices of the Supreme Court's Appellate Divisions in the First and Second Departments are at odds upon two fundamental questions, the one, whether matrimonial causes are suits within Equity's jurisdiction and subject to its maxims, or are actions at law wherein an applicant bringing himself within the letter of the statute must prevail,—no matter how base and unjust his own conduct may have been; the other, whether the court is rigorously bound by the pleadings or may, *sua sponte*, go beyond them, or order their amendment. The majority seem to hold that in these causes parties with unclean hands shall be at disadvantage, and that the Court will regard defenses transpiring in evidence although not pleaded. The dissent maintains, apparently, that he who brings himself within the statute's letter must prevail, the court having no right of its own motion to consider the equitable demerits of his case.

In addition to the nominal parties of record in matrimonial causes,—each, it may be, willing and even anxious, if not, technically, colluding, to sever bonds that chafe,—there is a third

[1]This article is written with particular reference to the New York cases.

[2]Kent's Commentaries (12th Ed.) Vol. 2, p. 97.

[3]Thompson *v.* Thompson, 127 App. Div. 296; (2nd Dept., June 18th 1908); Stokes *v.* Stokes, 113 N. Y. Supp. 142; (2nd Dept., November 27th, 1908; not officially reported); Berry *v.* Berry, *N. Y. Law Journal,* January 21, 1909, 114 N. Y. Supp. 497.

quasi party, the State, more interested in maintaining the stability of the marriage relation, as a condition of its own well being, than in the temporary felicity or advantages of the individuals at bar.[4]

The first two causes were decided in the Second Department. *Thompson* v. *Thompson* was reversed by a bare majority, so that the judges taking part in it were evenly balanced, three to three, while *Stokes* v. *Stokes* was affirmed with one dissent. The third, *Berry* v. *Berry,* was an affirmance in the First Department, with two dissents, and without citation of or reference to the other two cases. The facts in all show that some men are very much lower than the angels. *Thompson* v. *Thompson* is a tale that is told. A Proctor, if so empowered, would be justified in carrying it up and settling the interesting question involved. This the parties will never do. The State was the only party aggrieved by the success of the plaintiff, whose hands, as well as the defendant's, were in a shocking condition.

The facts were these: On December 9th, 1873, plaintiff married defendant. The next day he left her,—"went," as she proudly says in an accommodating affidavit admitting her own polyandry, "to fight under General Custer in the Indian wars." After the first year's absence he never wrote to or communicated with his Ariadne, who, in November, 1879, without going to the trouble or expense of divorce, or, so far as appears, inquiring as to her husband's whereabouts, espoused in hollow matrimony one Ziegler, with whom she lived until his death in 1895, bearing him children. Four years later she contracted another alliance,—marriage it can scarcely be called,—with one Hudson, with whom she was living when plaintiff began this action for divorce in 1905, predicating it upon both the Ziegler and Hudson affairs. Mrs. Thompson-Ziegler-Hudson, on receiving the summons, said: "She thought it was no more than right under the circumstances Mr. Thompson should have a divorce,"[5] filed no answer, and defaulted at the trial, when

[4]Strong *v.* Strong (1865) 28 How. Pr. 432; McLeary *v.* MsLeary (1883) 30 Hun 154; Winans *v.* Winans (1891) 124 N. Y. 140.

[5]Evidently the lady was fair-minded and meant no harm, for, as Mr. Justice Gaynor said in Stokes *v.* Stokes, *supra:* "There are a good many people who in good faith think they have the right to marry again after their spouses have abandoned them for five years, without the necessity of any inquiry as to whether they remain in the land of the living, and who act upon that motion." Litigation, moreover, is expensive, a divorce suit costing, as a learned Professor, who sees no increase of immorality in the fact that one marriage in twelve now is followed by divorce, told a Bible class the other day, on the average $50; a considerable sum to the needy, yet cheap at metropolitan rates.

Thompson, being called by his attorney to make formal proof that he had not procured or connived at the offenses and had not known of them for five years prior to the action, was interrogated by the Court, *without objection or exception,*[6] and it transpired that he came home in 1883, ten years after his flight, learned of his wife's remarriage, "tried to locate her; couldn't find her anywhere; so gave up the chase." He then, in 1884, married Maude Rice and lived with her for twenty years, and then found a new use for the old wife, "So," as he puts it, "I had then a party hunt her up to get a sworn statement from her that she was not divorced from me, which she did;" whereupon Miss Rice procured an annulment of plaintiff's second marriage. To the Court's question: "Are you going back to your second wife or through with her?" he answered, crisply, "Through with her for life," showing that he was not seeking divorce in order to make reparation to Miss Rice. The Court dismissed the complaint upon this ground, "The misconduct of the plaintiff prevents the granting of a decree to him, as he admits he deserted defendant and lived in adultery for twenty years."

Upon appeal plaintiff argued that in default of answer no issue of his adultery arose, that the Court had no power to raise by "inquisitorial" questioning an issue not presented by the parties, that, since adultery barring plaintiffs from divorce must be such as entitles defendants to a decree, therefore, this defendant, if she had answered, could not have set up in recrimination the Thompson-Rice affair, because her affidavit in evidence showed that she had known of it prior to her alliance with Hudson, seven years before the action was begun, and was therefore barred by lapse of time.[7] He further argued that, the divorce action being "statutory,"[8] the Court cannot travel outside the facts established by such testimony as the parties adduce, and that in the case at bar there was nothing in the facts and circumstances established by plaintiff's evidence to justify either an inference of collusion or disbelief in the plaintiff's uncontradicted testimony; which, nevertheless, showed conclusively enough that he knew of his wife's remarriage before his own second venture, and twenty years before commencing this action predicated in part on the Ziegler affair.

[6]Therefore, had the questions been asked by counsel no error could have been assigned justifying reversal (Valentine *v.* Valentine (1903) 87 App. Div. 156). See note 11 *infra.*

[7]Citing Morrell *v.* Morrell (1848) 3 Barb. 236.

[8]Citing Roe *v.* Roe (1878) 14 Hun 612; Smith *v.* Smith (1834) 4 Paige 432; Hopper *v.* Hopper (1844) 11 Paige 46.

The Appellate Division, Gaynor, *J.*, reading, and Woodward and Rich, *JJ.*, concurring, reversed upon these facts the judgment below, and directed a judgment for plaintiff, saying:

"The learned Justice below had no right to deny judgment to the plaintiff. *The fact that he had committed adultery was a defence to be pleaded and could not be lawfully proved in the case unless pleaded. That courts have no right on the score of public morality, to permit adultery of the plaintiff to be proved in a contested case unless it be pleaded as a defence, is not to be so much as disputed. (McCarthy* v. *McCarthy,* 143 N. Y. 235; *Lowenthal* v. *Lowenthal,* 157 *id.* 236). How, then, can it be suggested that it may be proved and used by the court itself as a defence in an uncontested case? Public morality can no more require it in the latter case than in the former." [9]

The Court then went on to say that while Court Rule 72 requires the first three of the obstacles to divorce enumerated in Section 1758 of the Code[10] to be negatived by the plaintiff, "no judge trying an undefended case is free to extend such rule to the said fourth obstacle." Hooker and Miller, *JJ.*, dissented,

"being of the opinion that in an uncontested divorce case the Court has the power to refuse a decree upon any of the four grounds specified in Section 1758 of the Code of Civil Procedure."

This prevailing opinion, which has the merits of all its writer's expressions, terseness and lucidity, seems to enunciate, unequivocally, a rule that in divorce actions, defended or undefended, courts are so bound by the pleadings that they are powerless to refuse a decree even though evidence transpire on trial showing that under the statute plaintiff is *not entitled* thereto; powerless, therefore, no matter how grave their suspicions may be, to elicit by their own questions or suffer to be elicited the truth, that facts exist, and, it may be, are collusively suppressed, which, the law says, shall prevent a decree. This is, of course, now the law. But was it so prior to this decision? Do the *McCarthy* and *Lowenthal* cases, under critical examination, sustain the proposition that the defense of adultery cannot be proved unless pleaded, and must be ignored by the courts if it transpire in the case? Neither of them seems to lay down such a broad rule. Mrs. McCarthy sued for an absolute

[9] Italics are the writer's. No weight is given to the fact that the trial judge's questions were not objected to.

[10] The section provides explicitly that "the plaintiff is *not entitled* to a divorce, although the adultery is established," where he has (1) connived or procured, (2) forgiven, (3) failed to sue within 5 years from discovering the offense, (4) been guilty of an adultery that would have entitled defendant, if innocent, to a divorce.

divorce. McCarthy recriminated. The referee found, upon conflicting evidence, in plaintiff's favor. Defendant on appeal urged that when plaintiff rested she had not proved, under the rule, non-existence of the three bars to divorce,—consent, connivance or procurement and forgiveness. As to this contention the Court only held that it is no part of plaintiff's *prima facie* case in contested actions to negative these three defenses, that the rule only requires their existence to be negatived by complaint or affidavit in cases of default, and that in litigated actions they are matters of affirmative defense and should (not necessarily must) be so pleaded.[11] But there is no word indicating that, if in the course of trial the existence of adultery or any other defense transpire, the Court is powerless either to dismiss the complaint or, in case of surprise, to continue the cause, in order that the defense may be set up and rebutted, if possible. The *McCarthy* case, therefore, does not sustain the sweeping proposition for which it is cited.

Lowenthal's action was also for absolute divorce, but there was no recrimination, and the question whether the defense of adultery can be proved if not pleaded was not specifically raised. The chief point involved was whether the lower court after, inadvertently, by use of the double negative, misdirecting a finding of connivance, which is not properly a framable issue, had power

[11]In fact they were negatived in Mrs. McCarthy's complaint, and the referee, after receiving her testimony to the same effect, struck it out as inadmissible under Section 831 of the Code, which provides that "a husband or wife is not competent to testify against the other upon the trial of an action or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery." In so doing he relied upon Farace *v.* Farace (1881) 61 How. Pr. 61, an action for divorce, wherein confirmation of the referee's report was opposed because he had not examined the plaintiff as to non-existence of connivance, etc., which were alleged in the verified complaint. Reading together the Court Rule and Section 831 of the Code, Larremore, J., held such examination unnecessary, and said:

"We are relegated to the old practice in chancery by which such collateral facts set forth in a verified complaint, or by affidavit, become *prima facie* evidence, and the burden of proof is thus shifted upon the defendant. No other construction is consistent with the statute. The proof required by Rule 73 must primarily be obtained by the testimony of the plaintiff, which is made incompetent on the trial or hearing of the case upon its merits. If such facts must be established, and no one but the plaintiff can prove them, the only alternative is to consider them as a matter of affirmative defense, which the defendant, in view of the disability of the statute, is bound to controvert and disprove."

Notwithstanding Section 831, if A. gives, *without objection*, testimony prohibited thereby, this is not such error as demands a reversal. (Valentine *v.* Valentine (1903) 87 App. Div. 156, *supra*). In this regard the only difference, if it be one, between the Thompson and Valentine cases is that in the former the Court and in the latter counsel elicited the forbidden testimony.

to correct the verdict. The Court of Appeals, approving the correction below, and reciting anew its construction of the practice rule in the *McCarthy* case, said:

"In the case at bar neither the general denial of the answer, nor the interrogatories framed for the jury, raised any issue other than that of adultery. The defendant neither pleaded connivance as an affirmative defense, *nor did she offer proof on such issue.*" [12]

The *Lowenthal* case, then, is even further than the *McCarthy* case from being authority for the proposition that a defense proved or transpiring in divorce may not be considered by the Court unless pleaded; for its words, above italicised, are either meaningless or they indicate that, if proof of connivance had been offered in this action the court might have regarded that defense although not pleaded.

The *McCarthy* and *Lowenthal* cases both considered only the three defenses embraced in the General Rule of Practice, which does not require the defense of adultery to be negatived for the same reason that a defendant in divorce is not required to verify an answer, or a witness to answer incriminating or degrading questions. The rule laid down by them is that the existence of these three bars to divorce, or "affirmative defenses," need not be negatived or disproved by plaintiff where the action is contested, but must be on defaults, where the rule of court requires a party to give testimony that the Code forbids him to give on the trial of the action.

The utmost, therefore, that these two cases decide is that connivance or procurement, forgiveness, laches, and adultery are defenses which, in strict pleading, should not be anticipated and negatived in the complaint; but if the first three are so anticipated, in order to avoid making the affidavit required by the practice rule, then, apparently, a denial of the anticipatory allegations raises no issue, although said allegations are material to plaintiff's procurement of his decree and are *prima facie* evidence of their own truth.

So much for the technicality of pleading. As matter of practice the courts have always asserted their power in divorce actions to see that existing defenses, particularly those embraced in the rule, shall be disclosed, to the end that decrees may not be granted to which parties are not entitled under the substantive law. This attitude was early indicated in *Williamson* v. *Parisien*[13]

[12] (1898) 157 N. Y., 236 at p. 242; italics are the writer's.

[13] (1815) 1 Johns. Ch. 389.

and *Williamson* v. *Williamson*,[14] the parties being the same in each case, wherein plaintiff, the husband, sued for divorce twenty years after leaving his wife, who eight years after his departure married one Parisien. The former case was dismissed "without reluctance" by Chancellor Kent because it appeared that plaintiff was not domiciled in the United States. Williamson immediately thereafter brought the second action on substantially the same facts. The bill and answer having been filed on the same day by consent, whereas the former action was obstinately litigated, the Chancellor inferred from this change of front "some negotiation or accommodation which does not appear, and to which I mean not to be a party by giving it any facility." Regarding it to be the policy of the law not to proceed upon the consent of parties, he considered the case as presenting a serious controversy, construed the provision of the existing statute, that after establishment of the adultery "it shall be lawful for the Court to decree a dissolution of the marriage," as giving the Court discretion, and dismissed the suit under the analogy of the civil law that acquiescence of five years without existing disability is a bar.[15] He said:[16]

[14](1815) 1 Johns. Ch. 488.

[15]This principle was substantially embodied in the Revised Statutes; Valleau *v.* Valleau (1836) 6 Paige 207, at p. 210. The first statute, Ch. 69, Laws of 1787, provided only for absolute divorce on account of adultery, and said, "It shall or may be lawful in all cases of adultery," etc., "for the party injured to exhibit or present a petition or bill to the Chancellor of this State for the time being, in chancery, setting forth the adultery," etc. It provided for framing issues and trying them before a jury in the Supreme Court as the Chancellor should direct, and in case of failure to deny the allegations, or "if such proceedings shall be had in this same Court of Chancery that said bill or petition might *according to the course of that Court* be taken *pro confesso*, then, nevertheless, the Court should direct proof of facts to be taken and in case the allegations should be found true then the Chancellor "shall and may proceed by sentence or decree in the same Court" to pronounce the marriage dissolved. No provision was made for the existing statutory defenses, for annulment or for separation. The second statute, Ch. 111, Laws of 1813, added the cause of action for separation, cruelty or abandonment of the wife, which was subsequently extended to the husband. The statutory defenses were not, therefore, derived from the Chancery rules, as was contended by appellant in Thompson *v.* Thompson [(1908) 127 App. Div. 296], and the provision for affidavit of their nonexistence first appeared in Rule 165 of 1825, adapted to the Revised Statutes. They are matters of substantive law, intended to forbid divorces where they exist, and not mere rules of procedure. Rule 168 provided for setting them up in pleading. The 51st Rule, 1806, provided that where the verdict found the adultery, the complainant should not be entitled to an order on the return of the *postea* unless the judge before whom the issue had been tried should certify that on the trial no evidence of the confession of the party charged with committing the offense had been taken, and the 84th Rule, edition of 1815, provided that the trial judge should certify that the verdict was supported by proof without, or in addition to, the confession of the party charged.

[16]At pp. 491-2.

"The general rules of the *English* jurisprudence, on this subject, must be considered as applicable, under the regulations of the statute, to this *newly-created branch of equity jurisdiction.*[17] * * * I cannot but persuade myself, that when the statute created a jurisdiction in this Court, for the cautious and limited exercise of the power of divorce, it intended that those settled principles of law and equity on this subject, which may be considered as a branch of the common law, should be here adopted and applied."

In *Smith* v. *Smith*,[18] upon a feigned issue of adultery, defendant offered evidence of condonation, which was held to have been properly rejected because the sole point involved in the feigned issue was defendant's guilt or innocence. The Chancellor said that if defendant wished to prove condonation or recrimination "*strictly* she should urge it by way of special plea or insist on it in her answer as a defence." [17] Here, again, the italicized word is either superfluous or implies that the rule was not inflexible. Accordingly, after saying that a good defense omitted through mistake or inadvertence should have been set up at the earliest opportunity by amendment or supplemental answer, the Chancellor said, *obiter,* it is true:[19]

"This Court, however, will *in no case*[17] dissolve a marriage contract, on the ground of adultery, where it appears upon the *pleadings or proofs, properly taken,*[17] that the injured party, with a full knowledge of all the facts, has actually forgiven the injury, and which has not been revived by subsequent misconduct; or where it appears that the adultery was committed by the procurement, or with the connivance of the complainant."

Here, once more, the italicized words are either superfluous or would seem to imply that if a defense transpired in the proofs, the Court may take cognizance of it; an inference strengthened by the Chancellor's further saying that the Court might at any time before final decree, as a matter of discretion, though not of the party's right,—"if there is reason to believe such a defence exists,"— direct inquiry to ascertain the fact in order to guard against fraud or collusion. It may be noted, however, that only the defenses of forgiveness, connivance and procurement were specifically named.

Commenting on Smith's case it was said, in *Morrell* v. *Morrell*[20] of the intimation that the Court, where there is reason to suspect condonation, will of its own motion direct an issue to ascertain the fact, that the point was not before the Chancellor; but, neverthe-

[17] The writer's italics.
[18] (1834) 4 Paige 432.
[19] At page 435.
[20] (1848) 3 Barb. 236.

less, that "such a course might be proper to guard against a fraud upon the Court, when there was reason to suppose a *defence* existed in fact, and the parties were seeking, by collusion,[21] a decree dissolving a marriage contract." It was also said that the point was not applicable to the case at bar because there the omission of the party tended to defeat the application, and "if the plaintiff, by his own neglect, will permit his suit to be defeated by an unfounded defense, it need not excite the concern of the Court." In other words, discretion will be exercised more freely to maintain the marriage relation than to sever it.

In *Roe* v. *Roe*,[22] a motion for a new trial in a wife's action for separation was refused where there was no plea of forgiveness or condonation *nor any evidence*, in the Court's opinion, to sustain a different result. Nevertheless, after citing *Smith* v. *Smith*,[23] to the point that "strictly" such defenses should be pleaded, the Court said:[24]

"Perhaps, if the defenses mentioned had been established to our satisfaction, we might suggest a way whereby they might be rendered available to the defendant."

In *Peck* v. *Peck*,[25] a husband's action for absolute divorce, wherein recrimination had been allowed to be set up by amendment on trial, and a decree had been denied because both parties appeared guilty, the Court said, citing *Smith* v. *Smith*,[23] that the amendment was within the Court's discretion and proper.

"It is not the policy of the law to allow judgments of divorce to be taken where a valid *defense exists*, and courts on their own motion interfere to prevent such result, where the facts are brought to their knowledge." [26]

Here, as in *Morrell* v. *Morrell*,[27] it will be noted that adultery is included in the italicised words and was allowed to be set up on trial.

In *Karger* v. *Karger*,[28] it was said, following *Smith* v. *Smith*.[23]

[21] This word is commonly used in the cases, not in its technical sense, in divorce, *i. e.*, an agreement that the offense be actually or apparently committed, but as indicating an agreement to obtain relief that the Court would not grant if all the facts were known.

[22] (2nd Dept. 1878) 14 Hun 612.

[23] (1834) 4 Paige 432.

[24] At p. 615.

[25] (4th Dept. 1887) 44 Hun 290.

[26] At page 292. Italics are the writer's.

[27] (1848) 3 Barb. 236.

[28] (Special Term, January, 1897) 19 Misc. 236.

"The proof of connivance and forgiveness is not to be disregarded because the defenses were not pleaded."[29]

In *McCleary* v. *McCleary*,[30] the Court said that the reason why the report of the referee and the testimony must be presented to the Court

"is that, in matters of divorce, the public have an interest. Married parties are not to be permitted by any collusion between themselves to obtain a judgment of divorce. It is the right and duty of the State, acting through its courts, to see that no divorce is granted, unless there be real and not collusive ground therefor." [31]

In *Strong* v. *Strong*,[32] it was said, upon an application for amendment, that although in ordinary cases laches might be ground for refusal,

"yet in action for divorce the privilege of amending so as to set up a valid defense, is not only allowable at any time before trial, but the Court should of its own motion, require *any valid defense* to be interposed of which it had any knowledge."[33]

And again, after descanting upon the difference between the contract of marriage and others, and the public policy that forbids its dissolution save for adequate reasons:

"The courts will not permit a marriage to be dissolved in consequence of the *negligence* or collusion of the parties." [17]

So in a recent case, although it is said that if condonation is relied on as a defense it should be pleaded; yet it is also said that the public interest requires the Court to take note of that defense if it appear in the proof, and refuse the relief in a proper case.[34]

If this is true of one defense why is it not true of all, of adultery as well as of its condonation?

What have the text books to say on this point?

Bishop on Marriage, Divorce and Separation,[35] says:

"By all opinions, English and American, one shown to be guilty of adultery cannot have a divorce for adultery committed by the other." Again:[36] "The public being a party to the divorce suit, *if in any manner there is disclosed in it an adequate defense, though not pleaded,* the sought-for divorce will not be

[29]At p. 238.
[30](3rd Dept. 1883) 30 Hun 154.
[31]At p. 155.
[32](Superior Court, Special Term, 1865) 28 How. Pr. 432.
[33]Citing Smith *v.* Smith (1834) 4 Paige 432. Italics are the writer's.
[34]Merrill *v.* Merrill (1899) 41 App. Div. 347, at p. 349.
[35]Edition of 1891; Vol. 2, Ch. XI, Sec. 350.
[36]Sec. 619.

granted, the public interest not permitting." [17] And again: [37] "But this party (the State), unlike the others, never loses a right by laches; and so, whenever a defense *comes out in the evidence, whether alleged or not,*[17] it is fatal to the proceeding. A maxim in these suits, therefore, is that a cause is never concluded as against the judge; and the Court may, and to satisfy its conscience sometimes does, of its own motion, go into the investigation of facts not contested by pleadings." [38] Once more: [39] "If the matter of defense appears either by the complainant's own admissions upon the record, *or by the testimony of his witnesses,* the Court of its own motion, or moved by the opposing counsel, will take the objection at the hearing." [40]

Nelson, a more recent writer, says: [41]

"It is objected, however, that the Court cannot lay hold of any matter not properly in issue and dismiss the action because evidence introduced by defendant discloses recrimination. The only exception appears to be where the plaintiff in proving a case discloses his own guilt." [42]

Thus this author appears to differ from Bishop by a narrower generalization, and to think that a continuance and not a dismissal of the complaint would be proper, except where the plaintiff himself discloses the defense, as did Thompson by his own testimony; in which event, obviously, there can be no surprise.

Finally, Judge Rumsey, in his work on New York practice,[43] lays down the general rule that if the Court has reason to suspect, at any stage of the cause, the existence of a valid defense,

"it will inquire into it, or will allow an amendment to enable the defendant to set it up. It is not the policy of the law to allow judgments of divorce to be taken *where a valid defense exists,*[17] and the courts on their own motion will interfere to prevent such a result where the facts are brought to their knowledge in any way." [44]

It would seem from all these authorities that one would have been justified,—prior to the decision of *Thompson* v. *Thompson,*[3] —in maintaining confidently that while the strict rule in divorce as

[37] Sec. 663.

[38] Citing Smith *v.* Smith (1834) 4 Paige 432.

[39] Sec. 625.

[40] Citing Smith *v.* Smith (1834) 4 Paige 432. The italics are the writer's.

[41] Nelson on Divorce and Separation, Sec. 443.

[42] Citing Jones *v.* Jones (1866) 18 N. J. Eq. 33. The only difference between plaintiff's and defendant's disclosure is that the former cannot be a surprise.

[43] 1st Ed. Vol. 3, p. 214; 2nd Ed. p. 266.

[44] Citing Smith *v.* Smith (1834) 4 Paige 432 and Peck *v.* Peck (1887 44 Hun 290.

in other actions is that all issues intended to be relied on should be pleaded,[45] nevertheless the Court may,—and may in duty be bound to,—amend pleadings not only on motion of parties but *sua sponte;* and otherwise prevent, in the State's interest, the granting of decrees dissolving marriages whenever there is brought to its knowledge the existence of those facts which the statute says, as a matter of substance, not of form, shall be a bar to divorce. Some of the cases, and all the text writers, include adultery among the defenses which will be taken cognizance of if they transpire in evidence.

Stokes v. *Stokes*[3] and *Berry* v. *Berry*[3] were actions for annulment of marriage by men who, after going through the form of marriage with women and living with them in the marital relation, with full knowledge of all the facts in the respective cases, sought to have their so-called marriages declared void. In each action the Special Term dismissed the complaints, and the judgments below were affirmed on the equitable principle that a suitor must come into court with clean hands. Both cases turned upon the question whether equity has any jurisdiction of matrimonial actions, except in those cases, such as fraud and lunacy, in which it has always had, independent of statute, jurisdiction of any contract. These were the facts in *Stokes* v. *Stokes:*[3]

On March 24th, 1875, defendant married one Hitchings, and lived with him until November 26th, 1896, when he left her and their children for parts unknown. On January 18th, 1905, defendant married plaintiff. For more than five years prior to the second marriage she had no knowledge that Hitchings was alive.[46] It also appeared from the record that three months after marriage

[45]Wood *v.* Wood (1830) 2 Paige 108.

[46]Apparently, the trial Court found both this fact and, by inadvertence, the inconsistent fact that she did know he was alive. The prevailing opinion considered there was no evidence to sustain the latter finding, which, if well found, would have necessitated a reversal. Under the Domestic Relations Law the marriage of a person whose husband or wife by a former marriage is living is void, unless either the former marriage has been annulled or dissolved for cause other than the adultery of such person, or the former spouse has been finally sentenced to life imprisonment or has absented himself for five successive years then last past without being known to such person to be living during that time, in which events such a marriage is void from the time its nullity is declared by a court of competent jurisdiction; therefore if defendant had known when she married plaintiff that her husband was living her marriage would have been void, whereas if she had been ignorant of his existence during the five years preceding her second marriage the latter connection would be void only from the time the Court so pronounced it.

plaintiff told defendant that he had learned that Hitchings was living but could not be located, and being asked by her what he was going to do, said: "Don't worry, don't bother, if he does come on, as long as you behave yourself, I will stick to you," thus promising to protect their marriage relation so long as she behaved well; whereafter they continued to live as man and wife up to the day the summons was served, a period of two years.

The majority concluded that the statute is not mandatory, giving plaintiff a legal right to annulment, but that under its equitable powers the Court may inquire into the circumstances and deny relief to the plaintiff if his hands are not clean. Accordingly, it was held in the case at bar that the decree might be refused, the marriage being voidable, not void,[47] and the Court said, by Woodward, *J.*, that it was plaintiff's duty after a reasonable opportunity to investigate the report that Hitchings was alive, "to act with reasonable expedition and decision" and without unnecessary delay to decide what course he would pursue; that he could not play fast and loose with defendant, induce her to cohabit with him, and then repudiate the relationship.

Miller, *J.*, Hooker and Rich, *JJ.*, concurring, were of opinion that to defeat the action defendant only needed to show

"(a) that her marriage to the plaintiff was contracted in good faith on her part, *i. e.*, that her former husband had absented himself for five successive years then last past without being known to her after diligent inquiry to be living during the time.[48] (b) that after knowledge of the facts the plaintiff elected to and did continue the marriage relation. The former was conceded by an admission of plaintiff's counsel, in reply to the Court's inquiry, that there was no question but that the marriage was contracted in "good faith."[49] The latter was established by the testimony of plaintiff himself."

If plaintiff intended to resist defendant's contention of good faith, against which there was some evidence, he should have done so at the time of said admission. "Then was the time, if ever, for the plaintiff to raise the point that that defense was not pleaded."

Gaynor, *J.*, dissenting, took the ground that ignorance of the

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[47]Citing Tait *v.* Tait (1893) 3 Misc. 218; McCarron *v.* McCarron (1899) 26 Misc. 158; Petit *v.* Petit (1904) 45 Misc. 155; Kerrison *v.* Kerrison (1880) 8 Abb. N. C. 444; Taylor *v.* Taylor (1901) 63 App. Div. 231.

[48]Citing Domestic Relations Law, (Laws of 1896, Ch. 272, Sec. 3), Matter of Tyler (1894) 80 Hun 406; Gall *v.* Gall (1889) 114 N. Y. 109.

[49]"Good faith" being used in the sense given to it in Gall *v.* Gall, *supra.* Note 48.

former husband's existence and diligence in inquiring concerning him are only partial defenses, going to establish legitimacy of offspring and to protect defendant by establishing the marriage until its annulment by decree, and that they should be so pleaded and proven; whereas in the complaint at bar they were set up in the answer as complete defenses, which they could not be, since they could not prevent the avoidance of the marriage. He considered that there is no defense to actions predicated either on void or voidable marriages; the only provision of the statute as to the latter being that they shall be deemed lawful until annulled; although prompt action must be taken on discovery of grounds for avoidance; an election to ratify being presumably irrevocable and a defense if pleaded and proved.[50]

As to the trial Court's conclusion that there was "an equitable estoppel against the maintenance by him (the plaintiff) of any action to annul said marriage" based on plaintiff's promise to stick to defendant and his continued cohabitation with her, he said:

"*Matrimonial actions are not equitable actions.* They did not belong to Chancery, but to the Ecclesiastical Courts, and the main ground on which they were disposed of was that of the conservation of private and public morality and the stability of society; and that remains the rule. *The equitable maxim of clean* hands is not applicable," [17]

and he reached the conclusion that estoppel was neither pleaded, proved nor yet applicable since the marriage was void,[51] and estoppel is only applicable to voidable marriages.

The facts in *Berry* v. *Berry*[8] were very similar. Plaintiff having married Emma Bulmer at Leeds, England, in 1883, and lived with her a year, came to New York and, in 1897, married defendant, when it was obvious that he could have learned that his wife was living, and reasonably certain that he knew it. In 1905 he saw and talked with the former wife, yet returned to and lived with the second. He told the officiating rector at the second marriage that he was single and marrying for the first time. His hands were as soiled as they could be. Therefore, while all the Justices agreed that the second marriage was absolutely void under the Domestic Relations Law, the majority voted to affirm the judgment below and, by Clarke, *J.*, said:[52]

[50]Citing Terry *v.* Munger (1890) 121 N. Y. 161.

[51]He considered that there was evidence that defendant knew or should have known that her husband was alive when she married plaintiff.

[52]At page 499.

"The question here presented is * * * whether the husband who contracted a void marriage in bad faith can maintain an action to relieve himself of the consequences of said marriage by a judgment of the Court annuling the same, and so obtain the benefit of the provisions of Section 1754 of the Code of Civil Procedure;" [53]

and concluded that for the perjured plaintiff to "invoke the jurisdiction of a Court of Equity under such circumstances is reprehensible," and that he had "forfeited any right to a hearing or to a decree."

Considering the question "Does the Court, in actions to annul a marriage, sit as a court of Equity, and is the equitable maxim that a plaintiff must come into court with clean hands to be applied," the majority, relying chiefly upon *Griffin* v. *Griffin*,[54] concluded that equitable principles were applicable, and that the provision of Section 1745 of the Code that either party may sue during the lifetime of the other, is to be construed in aid of the innocent, and is susceptible of the construction that it was intended to apply to parties acting in good faith,—as when the husband or wife of a spouse absent five years and not known to be living remarries. Scott, *J.*, dissenting, with whom concurred Ingraham, *J.*, considered that the marriage, being absolutely void, could not be affected by the decree; that "this action is purely statutory" and that

"the Court is not acting under its general equity powers. It is acting under jurisdiction conferred upon it by statute and the plaintiff has brought himself within the terms of the statute."

Thus they came to the same conclusion as Gaynor, *J.*, so that of the Supreme Court judges in these two departments, including the trial judges, nine are of opinion that equitable jurisdiction covers such cases and that the maxim of clean hands is applicable, while three dissent from that conclusion.

It is perfectly true that at common law courts of neither law nor equity had jurisdiction of matrimonial causes, and even ecclesiastical tribunals, which we have never had, possessed but a limited jurisdiction. Our courts have never had inherent general jurisdiction of annulments, divorces and separations, but only such jurisdiction as statutes have conferred. It is none the less true that ever since the first statute in the premises placed the divorce

[53] Making the judgment of annulment conclusive evidence of the invalidity of the marriage in all courts, actions or proceedings.

[54] (1872) 47 N. Y. 134.

action under Chancery's jurisdiction, to be conducted according to the course of that court, it has been generally understood that the action is equitable and that equity's maxims apply to it. If A sells B a house he is presumed to sell him access to it. If a statute gives to a court jurisdiction of an action and directs that it shall be conducted pursuant to the course of the court, it is fairly to be presumed that the maxims usually applied by that tribunal shall become applicable to that particular action.[55] The rule that plaintiff's adultery shall operate as a bar to his action for a divorce is such an obvious application of the equitable maxim of clean hands that, according to Rabbinical legend, Nature herself put it in operation, even under the lax Mosaic law of divorce, that still obtains to a greater extent than the Christian or gentile world realizes.[56]

To sum up the matter, the weight of authority seems to be, (1) that in New York, and in all States wherein the statute has created matrimonial actions and placed their conduct in Chancery, those causes are equity suits, to which equitable maxims are applicable, (2) that although, beyond doubt, proper pleading in these suits requires that all the facts which the statute declares shall be bars to a decree should be set up affirmatively as defenses,[57] nevertheless such is the importance to the State of a stable marriage relation that even under the prevailing and lax pleading in which affirmative defenses are anticipated and the general issue only is pleaded by the answer, for fear that affirma-

[55]In Williamson *v.* Williamson (1815) 1 Johns. Ch. 488, at page 491, Chancellor Kent used the expression italicised above, "this newly created branch of equity jurisdiction." In his Commentaries he speaks of matrimonial causes as equitable under our statutes. Vol. 2, p. 76, *et passim.* So does Judge Willard in his treatise on Equity Jurisprudence, p. 654, *et seq.* In Lowenthal *v.* Lowenthal (1898) 157 N. Y. 236 (cited by Judge Gaynor in Thompson *v.* Thompson (1908) 127 App. Div. 296), the Court of Appeals twice speaks of the divorce action as one in equity, and so in Griffin *v.* Griffin (1872) 47 N. Y. 134.

[56]The law of Moses, (Numbers V, 14 *et seq.*) provided that when a man suspected his wife of infidelity, but had no proof, he might take her before the priest that the latter might prepare and give her to drink the "bitter water," that came to be known as "the water of jealousy." Then, if she were guilty, it was written that the draught should cause the curse of swelling and rotting, whereas if she were innocent it would only cause her to become fertile. Commenting upon this the Rabbins said that if the husband himself had been guilty with another woman then the waters had no bad effect even if the wife were legally criminal. Cf. Chancellor Walworth's dictum in Wood *v.* Wood, 2 Paige, at p. 110, "If both parties are guilty, neither has any claim to relief; and they are in that case suitable and proper companions for each other."

[57]Wood *v.* Wood (1830) 2 Paige 108.

tive defenses may imply an admission of guilt,—nevertheless the Court, in its discretion may require that, if the existence of any one of those defenses shall transpire in evidence, the pleadings shall be amended and, if necessary, the case continued, in order that the truth shall be made manifest and a party with unclean hands deprived of the relief that he craves.

W. A. PURRINGTON.

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